

SHARI'A, STATE, AND
SOCIAL NORMS IN FRANCE
AND INDONESIA

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**SHARI‘A, STATE, AND
SOCIAL NORMS IN FRANCE
AND INDONESIA**

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I will consider here ongoing debates in two countries rarely compared, France and Indonesia, about what place Islamic norms concerning marriage and divorce ought to have, if any, in a unitary legal system. I view these debates not only as a case for comparative Islamic studies, but as part of something broader, an interlocking set of conversations across nations and world-areas about the place of diverse social norms in a political community. My interest in these conversations is in the ways in which institutional and conceptual structures shape public deliberations.

Citizenship is again in the news, with much of the current attention being focused on how rights attached to persons transcend the boundaries of sovereign states (Hanagan and Tilly 1999; Soysal 1994). Although nation-states organize the ways in which human rights, citizenship, marriage, or local elections are recognized, they have to answer to transnational ideas on each of these topics. Some of these ideas are written down in conventions and in the decisions of transnational courts; others are social norms on which national laws increasingly converge. In Europe, ideas about gender parity on electoral lists, the rights of “natural” children, and the balance of “soil” and “blood” in citizenship laws, are, in 2001, on a rapidly lengthening list of topics where one sees such a convergence, in part because of decisions taken by European institutions, in part because national interest groups can call on European norms to help make their cases for reform. Such convergences are not limited to Europe; legal aid groups in Indonesia increasingly cite human rights conventions, as well as European and North American laws, in support of legal changes concerning women’s rights.

Yet alongside of these references to transnational sources of personal rights are debates about the diversity of social norms and legal arrangements that are acceptable *within* the national political community. Regional histories and languages, claims by populations to be “peoples”, religions new and old, all are laying increasingly vocal claim to inclusion in the national cultural sphere (Amselle 1996; Grillo 1998; Kymlicka 1995; Modood and Werbner 1997).

Islam's role in these debates is marked by its dual character, as both a transnational source of norms *and* an element defining one or more subgroups, cultures, or "communities" within the nation-state (Noiriel 1996; Rath et al. 1999). This boundary-crossing character is intrinsic to Islamic conceptions of religious practice. As a discursive religious tradition (Asad 1986), Islam calls forth references from within societies to broader sets of texts and authorities. As a source of norms and law, it challenges purely local conceptions of family, gender, and economy, but also invites its own reshaping in the context of those conceptions, by engaging in *ijtihad*, the (re)interpretation of Islamic norms, or by incorporating "custom" (*adat*, *urf*) into law (Bowen 1998a).

This essay examines public deliberations about Islam and social norms. I look at debates over marriage and divorce in France and Indonesia, two very different places, neither thought of as being at the heart of the Muslim world. To be Muslim in either France or Indonesia can lead to heightened perceptions of a dissonance between "Arab" and "local" norms and values, and to efforts at reinterpreting the *shari'a* so as to bring its rules into line with local values. In some instances this very taking account of the difference, this stepping back from local values and Islamic rules, can lead one to rethink both: *ijtihad* as a two-way street. Mutual reinterpretation, looking at local and Islamic norms for the value to be found in each, is more apparent in Indonesia than in France, where the mere idea of normative pluralism is a bit risqué. But even in France, discussions about *shari'a* take place in the context of wholesale (or rather, a succession of piecemeal) rethinkings of French norms of family, gender, sexuality, marriage, and divorce.

France and Indonesia share more than one might think: the civil law tradition, a centralizing state ideology (and countercurrent moves towards greater regional autonomy), and a discord between certain aspects of Islam and certain local values, particularly with regard to gender equality. In both, too, the cultural content of citizenship (*citoyennet* ; *kewarganegaraan*) is a current topic of public debate, specifically with respect to the compatibility of religious and regional identities with national loyalties. My focus is on the legal aspects of these debates, but debates over law often point to broad issues of culture and social order. Jurists, judges, and legislators have had to take account of internal social diversity and also of internationally circulating norms and institutions. Muslim commentators, a category that even in France includes some of those jurists, have had to propose ways of understanding Islamic law in diverse sociolegal contexts.

What should an ethnography of public deliberation look like? In this essay, I begin with the institutional limits on the topics and positions that are accept-

able in public discourse. In each country, only some public spaces (journals, broadcasts, government communiqués, mosques) are available as sites for public deliberation. People who are able to acquire the credentials to join in public debates engage in certain specific processes of reasoning and justification—and not others—and in doing so employ certain key concepts. Some of these are “first-order” concepts that are explicitly argued about: for example, the notion of “intent” in Islamic ritual, that of *adat* in Indonesia, or the notion of “public order” in French jurisprudence. What I will call “second-order” concepts signal positions about method or epistemology. These would include the notion of *ijmaʿ* in Islam, that of “contextualization” in Indonesian religious history, or that of “jurisdiction” (*comp tence*) in French law. Findings based on second-order concepts may prevent or allow first-order concepts from entering into these debates.

Notice that this way of posing questions does not concern what “correct” interpretations of Islamic law might be, but rather implies listening to what men and women writing in public forums *say* about Islamic, or French, or Indonesian law.¹ As an ethnographer, I am predisposed to begin any study by looking at how people speak and write about it. I also believe that by taking “law” as a set of historically and spatially specific discursive practices, we best avoid grammatically (and also theoretically) induced misplaced concreteness.²

This approach leads us to examine how people publicly reason about such politically charged issues as the relationship of religious doctrines to legal structures, how they justify their pronouncements, and in what ways we can explain their particular public interpretations. I use “public reasoning” to call to mind the recent writings of John Rawls (1996) on liberalism and pluralism. Rawls speaks of public reason to refer to generally accepted principles of fairness and equality that diverse groups in a country can agree upon, what he calls the overlapping consensus. In a similar fashion, many legal analysts of Islam in Europe, at normative moments in their writings, have drawn a line between those ele-

1. In other words, I avoid making normative statements about “what Islam says”. I also avoid looking for historical precedents within Islamic legal traditions that are available for answering particular questions. Often these precedents are cited with a normative end in mind, such as: “Consider these, and you can give a ‘better’ answer to that question.”
2. Wittgenstein and Whorf helped us to see how our grammatical habits commit us to positions we might not wish to defend. I would cite the use of “Islamic/Muslim law” in the subject position in a sentence as one such widely shared habit, a habit which leads us to make such pronouncements as: “Muslim law . . . calls for separate schools and public transportation for men and women” (AP 24 February 2000).

ments of Islamic law that do overlap with European norms—which themselves are taken as the standard—and those that do not, and therefore cannot be tolerated.³

In response to this approach, I wish to underscore the ways in which the encounters between two or more legal systems may lead to movements of convergence or divergence, and not simply exist in a static condition of difference, with a certain fixed degree of overlap. In other words, I am interested in internal debates over fundamental questions of cultural values and political community, and the processes of reasoning—rather than “reason”—and justification that define those debates. Closely following such debates may make our own normative commentaries, should we wish to make any, more effective, insofar as they represent positions with a local purchase.

Now, in Indonesia and France, debates about the legal status of Islam in a pluralistic state refer to many topics, from polygyny to Christmas parties. But most importantly, I believe, they concern two basic issues, ones that touch on broader ideas of political and cultural community. The first is about legal plurality. Can there be more than one set of laws in one state? How should the state regulate the relationship between two different normative systems that confer validity on actions? Does allowing more than one set of criteria for these actions to have legal standing weaken the basis for national political unity? The second issue concerns law and culture, how the state should reconcile specific legal requirements with general cultural values. The values in question include, most saliently, those of equality: between men and women, among all citizens, or among all cultures. Under what conditions should such general values override a specific law?

The similarity of the issues despite the contrasts between the two countries—one in Asia, with an old Muslim majority; the other in Europe, with a recent Muslim minority—suggests that the issues are generic to countries that consider themselves as nations, and that have important Muslim populations. Not that the issues are new: debates about modernity, legal codes, gender, and Islam have taken place over the past two centuries. Nor are they limited to Muslim societies: the issue of legal plurality is basic to the field of “conflict of laws”; the issue of laws vis-à-vis culture recalls long debates about law and the community.

3. For Britain, such is the position of Sebastien Poulter (1995, 1998); for France, it is the mainstream position discussed below. For an excellent analysis of this problem in Britain, see Pearl and Menski (1998).

Put in another way, issues arising around Islam can be seen as general issues about the place of law in a modern nation-state. This way of looking at them makes Islam not an exception, but the source of one of many challenges to modern legal positivism (Pearl and Menski 1998, 51–59).⁴ Within each country, however, the issues are posed in local terms, in terms of French, or Indonesian, values and laws. These debates about Islam therefore throw into relief much more general tensions within each country about the bases for, we might say the constitution of, the political community.

INDONESIA: *ADAT* VIS-À-VIS ISLAM

In Indonesia, national-level deliberations about family law mainly take place in institutional settings where Islamic law is assumed to be a source of law. Why that is so has to do with the genealogy of jurisprudential debate in general.

Colonial rule left Indonesians with a segmented legal structure, containing separate courts for Europeans and natives, in which judges applied separate sets of laws (Lev 1985). Colonial legal scholarship also formalized distinctions among three types of law: the positive law of statutes taken from the French-Dutch civil law tradition; the customary law (*adatrecht*) valid in each of the many “*adat* circles” in the Indies; and Islamic law, which by the late 1930s had been limited to adjudicating marriage and divorce cases and with varying degrees of jurisdiction across the archipelago. Muslims were and are a majority of Indonesians, but at the moment of formulating a constitution for the new country, a coalition of non-Muslim and Muslim leaders successfully argued against including references to the *shari’a* in the final text. And so it has remained, although since 1999 there have been efforts to restore these references, sometimes called the “seven words”, to the Constitution.

Both the Sukarno and Suharto governments emphasized the importance of creating a unified legal system, in large part to ensure greater ideological and political control over social and political institutions (Lev 1973). But they also sought to avoid alienating those Muslim leaders who called for a more effective application of Islamic family law. A 1989 law expanded the jurisdiction and augmented the enforcement powers of the Islamic courts, even as this and other laws rendered the Indonesian legal system more tightly integrated and thus sub-

4. For a parallel argument concerning the sociology of Islam, see Babès (1997).

ject to greater state supervision. Islamic courts of first instance and appeals now exist alongside general courts (and hear cases involving marriage, divorce, reconciliation, and inheritance) (Cammack 1997). Decisions by judges in both sets of courts are subject to review by the Indonesian Supreme Court. Since 1991, judges are supposed to follow a Compilation of Islamic Law written by a group of jurists (Bowen 1999).

How to understand Islamic law has been a question of intense interest to many Indonesians, judging by the number of books, journals, and Internet discussions on the topic. The public space of such discussions is strongly shaped by the state through established and overlapping sets of experts who make pronouncements about Islamic law. These experts teach at the State Islamic Institutes (Institut Agama Islam Negeri, IAIN), and especially the IAIN Syarif Hidayatullah in Jakarta, or at the universities, or they sit on the Supreme Court's Islamic panel.

These networks overlap, although not completely. Much of the discussion of Islamic law as state law takes place in the journal *Mimbar Hukum* (Law's Pulpit), a publication of the Directorate of Religious Justice in the Ministry of Religion, which is in principle sent to all religious courts. Articles written by law professors and judges in the journal offer sometimes critical commentary on decisions by Indonesian courts, including the Supreme Court.⁵ Books about reinterpreting Islam, however, are usually authored or edited by Muslim public intellectuals, whose authority is based on a sense of their religious learning and their activities in Muslim organizations and schools, rather than on the office they hold. These books offer views on law in the contexts of Islamic history, Indonesian society, or scriptural analysis (Bowen 1998a, 1999).

Little in the way of coherent public discussion has existed for Islam's two major legal competitors in the area of family law: *adat* law and parliamentary legislation. In the 1950s, the Supreme Court and several legal commentators (notably the law professor Hazairin) did attempt to develop a national set of ideas and institutions about *adat*, but with little result (Bowen 1998a). No centralized state apparatus comparable to the Directorate exists to formulate propositions

5. Although matters of jurisprudence in the religious courts are officially the responsibility of the Supreme Court, and matters of administration the responsibility of the Ministry of Religion, some of the jurisprudential function of the religious court is unofficially supervised by the Directorate through its journal. The Directorate once did hear appeals from religious appellate courts, and its staff continue to see themselves as better informed on matters of Islamic law than are many Supreme Court justices, and thus able and obliged to supervise the content of decisions made by the Supreme Court and by lower courts (Bowen 1999).

about *adat*; the few bodies that do exist are limited to one or two provinces. The politics of the New Order were, moreover, inimical to the idea of *adat* as an alternative legal system; *adat* was represented in official books as more a matter of ceremonies and rituals than land-holding and dispute resolution. This situation may change; in 1999 and 2000, bodies claiming to represent “*adat* communities” (*masyarakat adat*) marched on Jakarta, elected representatives to local parliaments, and achieved prominent places on NGO websites. These bodies are currently, in late 2001, discussing *adat* law, in particular rights to use lands for gathering and swidden activities, but not in a way that (as of yet) conflicts with claims made in the name of Islamic law—as would, for example, a claim that *adat* inheritance law ought to take precedence over Islamic law (Bowen 2000b). Nor have comparable interventions into public space been made in the name of national parliamentary legislation.

The major institutional bases for legal norms that would have competed with Islam under the New Order were the executive political machinery ideologically defined around the state ideology of Pancasila, which included a generally worded monotheism, and the Parliament, where lively debates about law, religion, and national unity occurred in 1973 (when a marriage bill was presented, and then withdrawn) and again in 1989 (when the Islamic courts were regularized). Neither, however, provided an alternative vision, a basis for a sustained discussion of a nationalist approach to family law.⁶

RECONTEXTUALIZING ISLAM IN THE NAME OF EQUALITY

The national jurisprudential discussions about family law in Indonesia thus have taken place mainly within the framework of Islam.⁷ Many of these discussions have turned on two questions: to what extent one may reinterpret scripture in line with Indonesian values and practices, and to what extent the state may exercise authority in matters of marriage and divorce among Muslims.

6. Why this is the case is complicated, but has to do with Suharto's perception that expanding and regularizing an Islamic judiciary would increase state control of Muslim authorities and also ease pressures for a greater Muslim presence in the government, and the ineffectualness of the Parliament.
7. There are some recent exceptions to this generalization, for example, the Supreme Court justice Yahya Harahap's proposals regarding inheritance *adat* law. More detailed versions of the following sections appeared as Bowen (1998a, 1999).

Perceptions of a poor fit between Islam and Indonesia have generally concerned perceived inequalities in Islamic law and, in particular, a man's right to unilaterally repudiate his wife and to take a second wife, and the unequal shares of an estate awarded to daughters and sons.⁸ The two kinds of issue have required different approaches. The unequal division of an estate is specified in the Qur'an; efforts to state that proper Islamic norms for estate division are other than what is stated in the Qur'an thus require what I referred to above as "second-order" arguments about when one must follow what is in the Qur'an, or what it means to "follow" a text, or what it is to "read" the text in the first place. In Indonesia these arguments are often referred to as "recontextualizing" Islam, and they depend on examples of early Muslim leaders setting aside a Qur'anic provision in the name of a greater good. The Caliph Umar provides the major examples. (Refutations of these arguments tend to rely on Islamic ideas of certain and uncertain texts in scripture, thus, on a counter set of second-order concepts about text interpretation.)

But these arguments for contextualization also imply a rethinking of other forms of law on the basis of general values of gender equality or justice (*keadilan*), said to be shared by Indonesians and the Qur'an (thus, God). Arab societies and older Indonesian *adat* systems held a patrilineal bias, according to this argument, but Indonesian societies are gradually evolving toward the Qur'anic ideal. The major effort to develop a consistently gender-equal legal system, begun in the 1950s by the law professor Hazairin and continued into the 1990s by his students, sought the *simultaneous* reform of *adat* and Islam. So, *adat* becomes a contested concept itself, to be reworked in light of the Qur'an, just as the Qur'an is, for some, to be reinterpreted in light of this new understanding of *adat*.

We see this simultaneous critique of *adat* and Islam in practice today. On the one hand, the Supreme Court has sporadically ruled that patrilineal inheritance rules contradict the values and practices of contemporary Indonesians. In the Central Aceh district where I have been studying the courts, I see a general trend away from accepting *adat*-based divisions that favored men, toward demanding re-divisions of an estate, so that daughters (or daughters' children) receive a share of the wealth. Islam is often used to critique *adat* in these demands (Bowen 2000a).

On the other hand, we also see efforts to limit the use of provisions generally held to be part of Islamic law so as to ensure fairness. Two examples are new

8. There are other issues, too, for example that of the rights of orphaned grandchildren to inherit a share of an estate.

rules, part of the 1991 Compilation of Islamic Law, allowing orphaned grandchildren to inherit a share of an estate, and limiting gifts to one-third of an estate. I have argued (Bowen 1998b) that the latter rule, which was reaffirmed by a Supreme Court decision, may have been motivated by jurists' perceptions that gifts have been used in various local settings to deny daughters their share of inheritance.

THE VALIDITY OF *TALAQ*

A man's right to repudiate his wife or to take more than one wife poses quite different challenges to reformers than do the issues of equality and fairness. Repudiation and polygyny are options that men might or might not exercise; they are not commands (indeed, God seems to barely tolerate them). Thus, if the state places conditions on them, it can claim that it does not thereby deny the validity of scripture (as some say the state would do if it mandated an equal division of an estate between sons and daughters). But does the state thereby change the conditions for an act to be valid in terms of Islamic law, or merely the conditions for it to be valid in terms of state law?

The 1989 law on the courts and the 1991 Islamic code could be seen as giving *de facto* victory to those who had wanted the Constitution to proclaim the state's obligation to enforce Islamic law. Indeed, nationalist and non-Muslim groups who argued against the 1989 bill made precisely this claim. But these laws, and the 1974 marriage bill (which was incorporated into the 1989 law), were also intended to change the *de facto* implications of Islamic family law practices.

Among the most important changes made were reforms of divorce law, long a goal of women's groups in Indonesia. Before the reforms, a Muslim man could divorce his wife unilaterally by uttering the *talaq* divorce formulation. This act was recognized by state law as effecting a divorce. Women had to appear before a judge and request the judge to grant a divorce under one of several available categories, usually as *ta'liq talaq*, where the wife claims that the husband committed an act that, according to the marriage agreement, caused an automatic *talaq* to be activated, or as *faskh*, annulment.⁹

9. The *ta'liq talaq* is a conditional divorce in which the husband agrees (by signing a statement immediately after marriage) that the *talaq* will be effected should he commit any one of several faults.

Since the reforms, both men and women must convince a judge that one or more reasons for divorce, drawn from the same list, are present. A valid divorce only occurs when a husband pronounces a divorce utterance (still called *talaq*) in court, after the judges have told him to do so, or when the court grants the wife's request to annul (*faskh*) the marriage. The terms for divorce have also been made symmetric, though not identical; they are now *cerai talaq* and *cerai gugat*, which makes them subspecies of the legal action called *cerai*, Indonesian for divorce, even as the different Islamic textual bases are recognized, as *talaq*, initiated by the husband, and *gugat*, Indonesian for accuse or demand, initiated by the wife. Moreover, judges—at least those in Central Aceh where I have observed Islamic court practices—take great pains to treat the two sides in a symmetric fashion, and to assert their own claims to greater wisdom and greater authority than either the wife or the husband.

The legal changes thus sharply posed the question of the respective authority of state agents—including state-appointed religious judges—and individual Muslims to effect a divorce (similar issues arise for marriage, and most sharply for inter-faith marriage). The government's position in the 1989 bill that created the new court system was that state validity and religious validity were entirely separate matters, that a religiously valid divorce occurs when a husband pronounces a divorce utterance or when a court grants the wife's request to annul the marriage (as was the case before the reforms), but that the divorce is only recognized by the state if the utterance is pronounced in court and with the approval of the judge or judges.

The government intended this concept of “dual validity” to protect it from the kind of accusations made regarding divorce reform in several other Muslim countries, where the husband's right to declare a divorce was revoked and given to the court, thereby, in the eyes of many Muslims, contradicting the definition of divorce offered within established jurisprudence.¹⁰ This idea is similar to the recognition in the U.S., for example, of religious and legal actions of marriage, which often are combined in one empowered actor, such as a minister.

This interpretation was complicated in 1991, when President Suharto proclaimed the Compilation of Islamic Law to be the law of the land. The Compilation was intended to add substance to the new structure of religious courts. In effect, it reinforced the 1974 marriage law. The code's creators, consisting of

10. The Indonesian government had received similar criticism from Muslim groups when it introduced its first version of a marriage bill in 1973, although the main issue in that case was competency to perform a marriage, rather than competency to divorce. See Cammack (1997).

Islamic jurists and judges, claimed that it represented the consensus, *ijma'*, of Indonesian jurists, and that it merely codified what were already Islamic norms throughout the country. But precisely because it makes into religious law what had been merely state positive law, this claim could threaten that concept of dual validity on which the entire reform package rests.¹¹

Take the case of a husband who utters the divorce pronouncement in private. Does God recognize the private action? He has been assumed to do so by Indonesian jurists, judges, and ordinary Muslims for centuries. But if the Compilation is taken to constitute a new Indonesian jurisprudence, God might be understood to no longer accept the private divorce pronouncement. In the Compilation, article 117 *defines* a divorce as an action that must occur in court. Is this definition merely for the purpose of the exercise of state law? If so, how could it be considered as Islamic law? Or, is it Islamic law because it is the result of an *ijma'*? If so, has the state usurped the role of the *ulama*?

To date, appellate courts seem to have adopted the following position: despite the claims by jurists that the Compilation merely places into the legal sphere an already existing Indonesian jurisprudential consensus, judges have ruled that the Compilation has no *ex post facto* effects, i.e. events that took place before 1991 cannot be judged according to the Compilation. For example, in a 1993 case on an inheritance matter—namely, whether orphaned grandchildren could inherit their father's portion of an estate—the Jakarta appellate court ruled that it was only in 1991, thus after the death in question, that such rights became Islamic law (Zein 1996). As long as state law is seen as only positive law, then one can preserve one's own interpretations of scripture.¹² But this solution mocks the state's claim that the Compilation represents a consensus.

It may very well turn out that in the less authoritarian political climate of the Reform era, the Compilation will either be ignored, or revoked. But the centralizing institutions created since independence—the Ministry of Religion, the Majelis Ulama Indonesia, and the Supreme Court's Islamic panel—will surely resist efforts to decentralize religious law interpretation. Indeed, the MUI has declared that “religious authority must remain in the central government, not regional governments” and that Islamic law will not survive unless it is supported by the *ulama*, “whose image is reflected in the Department of Religion” (*Kompas* 9 March 2000).

11. See Bowen (1998a) for details. Elsewhere (1999) I develop the argument that “codification as positive law” contradicts “codification as consensus”.

12. This interpretation would make the Indonesian case similar to the divorce law reforms in Syria, Morocco, and Iraq, and different from that of Tunisia, which declared a *talaq* out of court to be religiously invalid. See Esposito (1982, 93–94).

These debates about law, the state, and culture may seem narrow, but in fact they bring into play broader issues about Indonesia. Should law be based on a set of common Indonesian values, or on religiously shaped values specific to a subgroup? Should residents of different provinces be governed by different laws? Is the Indonesian political community a nation/people (the Indonesian term *bangsa* means both), alike in fundamental ways, or is it an association of profoundly distinct communities, based on *adat*, regional heritage, or religious confession? Should Indonesian Muslims be first and foremost Indonesians, and thus engage in frequent and cordial interactions with Christians, or should they be first and foremost Muslims, and guard against the kinds of cross-confessional social relationships that could lead the unwary Muslim astray?

In sum, should Indonesia (in its past, present, and future) be thought of as a nation-state or a federation? And if a federation, what would be the constituent units?

FRANCE: ISLAM VIS-À-VIS PUBLIC ORDER

France shares with Indonesia a general legal structure built along non-religious lines. But in terms of the public space of debate about religion and law, France offers a reverse image of Indonesia. France has a highly developed tradition of jurisprudential commentary, linking judicial decisions to propositions about French society, which cite and are cited by social scientists writing in defense of the Republic.¹³

An Islamic intellectual framework, which plays an encompassing role in public discourse in Indonesia, is at best just beginning to emerge in France. Only in the past two years has there appeared a candidate for “journal of note” about Islam in France, the trimestral *Islam de France*, which has a certain overlap of personnel and perspective with the equally recent Sunday television program *Vivre l’islam*.¹⁴ These

13. I should note that, the two fields of power being quite different, it is the social scientist in France (for example, Dominique Schnapper) who performs the public intellectual role that in the United States is played by the law professor (for example, Ronald Dworkin). The difference is due in part to the different statuses enjoyed by the two fields in the two countries, and to the lesser role played by any one of the high judicial bodies in France in comparison to the salience and importance of the U.S. Supreme Court.
14. A bitter controversy, played out in the journal, still swirls over the earlier incarnation of the television program. The issues seem to be about personal ambition more than doctrine.

sites for public discussion remain controversial among Muslims, and do not yet have a substantial purchase within the state structure (although the television program plays over a state channel). Indeed, given the state saturation of all things public in France, it is not surprising that the absence of state-sanctioned representation is generally considered to be the major problem facing Muslims who wish to obtain permits to build mosques, develop indigenous religious authorities, supervise the certification of *halal* meat, and ensure the safe delivery of pilgrims to Saudi Arabia.

Given that the ideological and institutional foundations of France lie in the idea of a single set of laws, and indeed a single set of social norms, why does Islamic law arise at all as a matter of public debate? The answer lies in the specific history of French citizenship laws. For much of French history, lines have been drawn between citizenship, which accords full rights of political participation, and nationality, which distinguishes those persons subject to French rule from those subject to someone else's rule. For example, the 1791 Constitution distinguished the broad category of French nationals, *citoyens français*, from the *citoyens actifs*, who alone had full political rights; similar distinctions were employed in the colonies.

What did it take to be accepted as a citizen? The answer has varied by place and time, but usually it had to do with a perceived desire to "become French", whatever that might mean. For although the ideology of French citizenship has always been state-centered and assimilationist (Brubaker 1992), it has included the idea that residents not of French descent (not *français de souche*) must provide some indication of wanting to be French, and to prove that they have the habit of thinking and acting in a French way, before they can be admitted to full membership in the political community, the *cit*. (This voluntarist and culturalist idea is today found on the political left as well as on the right.)

Until 1946, a subject in the colonies was a French national without necessarily being a French citizen. Proving the desire to be French generally meant renouncing his or her personal legal status, which meant becoming subject to general French law rather than that of a local legal regime. This particular way of compartmentalizing subjects had the effect of identifying French family law with French domination. As in Indonesia, being governed by Islamic family law took on an anti-colonial character, notably in Algeria. Some Islamic authorities proclaimed taking French citizenship to be tantamount to apostasy (Charnay 1998, 37). (The very name for this legal system, the *indigenat*, took on such connotations of colonial domination that today one uses *autochtone* rather than *indigène* to refer to "indigenous peoples".)

The situation changed radically after World War II with two changes in citizenship law. First, De Gaulle extended French citizenship to all residents of overseas territories, thus collapsing the legal distinction between citizenship and nationality. French nationals living overseas or immigrating to the metropole were now all citizens in the eyes of law, a legal fact that did not automatically make them all equally citizens in the eyes of other residents of the metropole. Henceforth, a political and cultural discourse about the meaning of “citizenship” would coexist with a set of legal rules about “nationality”.

Secondly, the 1958 Constitution (article 75) distinguished between personal legal status and citizenship. French citizens would now keep their personal legal status unless they had voluntarily given it up. This provision meant that French citizens in the colonies now could claim to have their marriage, divorce, and inheritance governed under local laws, which for a large number of citizens meant Islamic law. Furthermore, they could carry this status with them if they moved to the metropole, which they did in increasing numbers in the 1960s.

In the 1960s and 1970s, large numbers of Muslims came to France from the North African countries of Algeria, Morocco, and Tunisia, and from the West African countries of Senegal and Mali. Today many of these people travel back and forth between France and their countries of origin, and sometimes contract marriages and divorces in those countries. In such matters, Moroccan nationals can claim to be governed under Moroccan law because of a bilateral convention entered into between Morocco and France. Under French understandings of international private law, other foreign nationals also can claim that marriages and divorces carried out in their own countries must be recognized as valid in France. Furthermore, a rapidly growing number of residents are dual citizens.

Thus, alongside the statist and universalist idea of the Republic, one which continues to define mainstream French social science writing about France (Lorcerie 1994), there exists a reality of legal—and of course cultural—pluralism. This pluralism involves far more than Muslim immigrants; it also involves the special legal statuses enjoyed by Corsica and Alsace, and the many different legally recognized customary law communities of the overseas departments and territories, the DOM/TOM (Rouland et al. 1996), many of which indeed are Muslim. France, too, has its *adat* law, but it exists as a dirty secret, one which the mainstream hopes will, one day, crumble away to leave behind the smooth fabric of the legal community of secular citizens.

In writing about these intertwined issues of legal, cultural, and demographic change, the concept of citizenship looms large. It has become one of, perhaps even the central category for debates about law, Islam, and culture, and thus holds a place somewhat comparable to that held by *adat* in Indonesia. (Just by

way of comparison, the Indonesian term *warga negara* is a much slimmer concept, such that it has served as a code word for people of Chinese descent, who, “merely citizens”, were not to be treated as part of the real political community.)

In these debates about citizenship, two somewhat more specific, although not more precise categories have been central: in jurisprudence, that of public order; in the social sciences, that of assimilation and its daughter concepts of insertion and integration.

“PUBLIC ORDER”, MARRIAGE, AND DIVORCE

Let me return to the specific examples of marriage and divorce. The issues that arise for French judges generally concern the consequences in France of marriages or divorces carried out elsewhere. If it is valid in Algeria or Morocco, for example, for a husband to take a second wife or repudiate a wife—practices which are not valid if performed in France—then should that marriage or divorce be recognized in France? Is a repudiated wife divorced? Can a man bring a second wife into the country under the provisions of French law allowing for *regroupement familial*? Can a second wife claim the same benefits as a first wife after her husband’s death? I will first mention the debates around marriage, and then turn to a fuller consideration of divorce.

In French legal discourse, noted jurists select cases for commentary in certain authoritative compendia such as the *Dalloz* (e.g. Ancel and Lequette 1998). Regarding these questions, jurists generally agree that polygamy should not be legally recognized in France. Sometimes they invoke the concept of “French public order”, a concept that works as a legal transforming machine, taking specific values and ideas about proper conduct, such as “monogamy” and “French-speaking”, and turning them into claims about order, thus about dangers to the French political community.

In French international private law, the concept of “public order” is usually invoked at the moment of a conflict of laws. The field of conflict of laws provides rules of precedence, which stipulate when a law from one corpus should be followed to the detriment of a law from another corpus. However, a judge may argue that the law that would take precedence were he or she to follow these rules would violate French norms, or would create a result “shocking to the conscience” (*choquant aux yeux du for* [Kokkini-Iatridou 1994, 22–23]).¹⁵ In such an

15. The term *for* is often used in this position in the arguments; it carries a sense of an “internal tribunal”, thus, conscience in the sense of a place of interior judgment.

instance the judge may rule that “public order” requires acting contrary to the usual rules. Currently the phrase invoked has been modified in order to situate the concept firmly in international law and also to recognize—*enfin*—that French social norms are not universal ones. Currently jurists write about “the French understanding of international public order” (Légier 1999, 294).

The idea of keeping “public order” is, of course, not limited to the field of international private law. It has been invoked with respect to debates about domestic understandings of family and marriage as well, for example with regard to the requirement that a couple remain sexually faithful to each other during marriage. In November 1999, a court in Lille took the “daring step” of allowing a married couple to set aside, explicitly, this norm as part of their marriage agreement (*Lib ration* 16 March 2000). France is in the middle of a wrenching re-evaluation of the relationship between family institutions and public order, at a time when many people have availed themselves of the new “pacts of solidarity” (PACs), a sort of quasi-marriage possible between any two unrelated persons, the equal rights of “illegitimate children” have been recognized (after serious pressure from the European Court of Human Rights), and the abolition of divorce with fault was seriously considered, although ultimately rejected, by the National Assembly.

This series of internal debates and changes has had an effect on French international law. Take, for example, the often cited “Baaziz affair” of 1982 (Monéger 1992) in which the judge distinguished between the validity of a marriage and its effects on public order. Two French citizens married in Lyon in 1954, but when the husband, of Algerian origin, did not declare French citizenship upon Algerian independence in 1962, he automatically became an Algerian citizen. He then married an Algerian woman in Algeria, returned with her to France, and was killed in a workplace accident. Should the two widows split the estate? The Lyon appeals court ruled that they should. The Cour de Cassation, however, ruled that although the second marriage was valid because it had been carried out according to Algerian law, it “contravened French public order” because it went against the interests of the first wife, who was French. Therefore, the second wife could not claim a portion of the estate.

The jurist Françoise Monéger points out (1992, 60–61) that this line of argument leads one to say that a marriage that France recognizes as valid—because French international private law recognizes marriages conducted in other countries according to the laws of those countries—nevertheless has no legal consequences in France. She concludes that this makes no sense. She also notes (*ibid.*) that had the first wife been Algerian, “French public order” would not have been disturbed (and her surmise is supported by the refusal of the Cour de Cassation

in 1986 to cite public order in a similar case involving two Algerian wives [Léger 1999, 310]). To Monéger this counterfactual argument, together with the fact that the Court admitted that the marriage was valid, renders the ruling absurd. She understands the idea of disrupting “public order” to mean what it would seem to mean on the face of it, namely, that dividing the estate would have disturbed orderly social life in Lyon.

But the Cour de Cassation’s reasoning seems less absurd if it is understood in the context of French moral ideology, rather than as an exercise in rational jurisprudence. In this reading, law is assumed to shape moral order, because we learn from law what we may and may not do, and these clear boundaries on our actions help make us moral. As Durkheim ([1906] 1978) insisted in his plea to not introduce divorce by mutual consent, which he thought—correctly—would lead to more divorces, the legal bonds of marriage shape morals/morale by regulating passions. Options outside of marriage weaken that regulating force and threaten public order. Much has changed since Durkheim’s day, but in 1999 the same logic underpinned the refusal of a parliamentary commission to abandon divorce by fault (that is where the line is drawn today). So doing would damage the “symbolism of marriage” and thereby damage the institution of marriage (*Lib ration* 21 September 1999). In commenting on the Lille decision mentioned above, which allowed a couple to forego fidelity in their marriage, the jurist Xavier Labbé complained that “the law no longer states what is good or bad, what should be permitted or forbidden. The legislator from now on will be satisfied to follow the evolution of morals.”¹⁶

From this perspective, “French public order” is a normative construct about the relationship of law to morality (and eventually to behavior), a subspecies of Durkheim’s idea of *conscience collective*, rather than a description of behavior. This understanding of the concept is consistent with the jurist’s self-conception: as a public moralist who knows, on sociomoral grounds, the conclusion he or she must reach, and then seeks the most legally incontrovertible path to that conclusion. Although the many jurists who continue to write commentaries on the issue of polygamy disagree on the best interpretation of French law, they all assume that one must forbid it. For example, Monéger’s rejection of the “public order” argument, mentioned above, is on logical grounds; her next step is to seek more plausible ways to forbid the recognition of polygamy, not to evaluate whether or not the law compels her to do so.

16. *Lib ration* (16 March 2000), quoting from the edition of the *Dalloz*, the authoritative compilation of French legal commentary, to appear the following day.

“Public order” arguments sometimes are buttressed by empirical claims, often invoking social science. In cases of polygamy, some jurists refer to the writings of Emmanuel Todd, who has argued that polygamous peoples cause the most problems in France, or to the claim that admitting second wives will mean that more children will be drawing on the state’s resources (cited in Déprez 1996). In fact, there are few polygamous immigrant families in France, probably many more *de facto* polygamous *français de souche* families. Monéger (1992) notes the current legal equality in fiscal and other matters between “legitimate wives” and “concubines”, the latter being a legal status in France and since 1999 part of the Civil Code. This legal equality, she remarks, makes it increasingly difficult to say that public order is threatened by the presence of a second wife on French soil. And it becomes still more difficult when one moves to the broader context of the European legal field. The European Court of Human Rights reinforced Monéger’s point on 1 February 2000, when it declared that France had to grant equal inheritance rights to “legitimate” and “illegitimate” children.

It is thus becoming more unclear what “normal” marriage is or ought to be. The question of normality was already undercut in 1980, when the Conseil d’Etat rejected a court’s argument that the right to bring a spouse into the country depended on a conception of a “normal family life”, and that “normal” implied monogamous. The case involved a man from Benin, and the Conseil stated that “normal family life” in that country extended to having two wives.

And yet the regime of polygamy is regarded as decidedly un-French, to the point that if you have married under a legal regime that allows polygamy, even if you yourself are not part of a polygamous relationship, this fact alone sometimes leads a court to judge an applicant for French citizenship as “insufficiently assimilated”, as in the case of a 1990 judgment by the administrative court of Nantes.

TALAQ AND EQUALITY

That it is a question of the moral force of law that is at stake in French courts becomes even more clear with respect to divorces obtained in North Africa under the institution of *talaq*, or unilateral repudiation. Should a divorce obtained in this way be recognized in France? What counts as relevant evidence to answer this question?

Until a 1997 decision by the Cour de Cassation put a temporary end to the discussion, there were, roughly speaking, two answers. The first was that *talaq*

should always be declared invalid in France, wherever and however it was effected, because the entire institution, including the relevant Islamic law, offends French principles of gender equality. One of the most influential jurists in the field, Jean Déprez, argued that *talaq* has nothing to do with divorce, because the judge could not prevent a husband from carrying out the divorce. Even if a treaty (such as the bilateral convention with Morocco) stated that such divorces should be recognized, “public order” places an absolute limit on what can be recognized as valid. In his notes on relevant cases in the law journal of note, *Revue critique du droit international privé* (e.g. 1995, 115–16), Déprez invoked the European Convention on Human Rights to argue that the norm of the equality of spouses as is intended in the Convention dictates that French jurisprudence should reject *talaq* entirely. This position was adopted by the Cour de Cassation in 1997.

The second answer is that one must look at each case to decide whether the wife was treated equally, or fairly. This answer rejects the argument that the “public order” be used to invalidate all instances of repudiation, because had that been the intention the relevant treaties would not have been signed. The lawyer Ibrahim Fadlallah upheld this position in a series of notes on cases published in the same law journal, pointing out that sometimes in practice the *talaq* resembles a divorce by mutual consent, which one can recognize as tolerable. This position did receive judicial recognition: in a decision by the Cour de Cassation on 18 December 1979 (the Dahar case), the wife was allowed to present her case before the judge in Algeria who heard the husband’s *talaq*, and this hearing was considered to constitute fair treatment. In the same year, two Paris appellate courts stated that a *talaq* was acceptable if it produced effects comparable to those of a divorce by mutual consent. In a surprise decision on 3 July 2001, the Cour de Cassation reversed its 1997 ruling, declaring that a *talaq* pronounced in Algeria by an Algerian resident of France did indeed have legal effects in France, because his wife (also Algerian) was represented in court and received financial compensation; an appeal to the European Court of Human Rights is planned.

Note that this direction of reasoning leads the judge to examine the details of a particular court proceeding in Morocco, or elsewhere. Was the wife present? How seriously were her views taken? How fair was the property settlement? In some cases the divorce is set aside “in the name of public order” because the French judge decides that the ex-wife did not receive a sufficiently large amount of money in the divorce settlement from the Moroccan court even if her position was heard. In the 1980s Fadlallah argued that although Islamic repudiation is foreign, history and immigration have mixed it into the French order of things and it therefore should be recognized by the courts (*Revue critique* 1984, 332).

The jurists' debates index a broad conflict between an ideal of French law in service of French values, and the legal recognition of trans-state social ties, trans-state legal conventions, and legal and cultural pluralism within France—a pluralism that now has to do with concubinage and PACs as well as with people from Algeria and Benin.¹⁷

THE LIMITS OF ISLAMIC PUBLIC DELIBERATIONS

We can sketch out a rough correspondence between the politically decisive spheres of public reasoning about family law in France and Indonesia. In France, this reasoning is strongly anchored in legal domains of jurisprudence and parliamentary debates; in Indonesia, in the domains of Islamic religious law. Muslim intellectuals in Indonesia are expected to couch their arguments in terms of Islamic law, and in a sense to broker between Islamic history and Indonesian law. Jurists and others engaged in parallel debates in France are expected to couch their arguments in terms of *la cit*, a notion which in its most pared-down, legalistic form prevents the state from placing religious referents into the public domain, but which in its fuller cultural and political dimensions indicates the non-religious public life that is structured for and presented to citizens by the state. Because that public life is to be based on universal (read: French) values, it must be free of religious or ethnic identities. And because it is the state that oversees public life, it must police both sides of the religion-public divide. It does so by creating structures of responsibility for each type of religion: Catholicism, Protestantism, Judaism, and now Islam. French regimentation of religion is a kind of indirect rule, where the state and the local ruler acknowledge each other's legitimacy, and the latter promises to keep his people in line in exchange for a certain degree of freedom of movement.

In order to create such structures for Islam, successive Ministers of the Interior (from Pierre Joxe in 1989 to Daniel Vaillant in 2001) have tried to create bodies that would "represent" Muslims in France. Competition between mosques, which in some cases also has been a competition between leaders with ties to different Muslim countries (notably Algeria, Morocco, and Turkey), has greatly complicated efforts to create a single structure to represent Muslims, as has the ten-

17. Fadlallah (interview, Paris, 21 May 2001) believes that if the wife were to express her agreement with the *talaq* procedure, the divorce's effects might still be recognized.

dency of Ministers to pick and choose allies, and in particular to place in and out of favor the grand mosque of Paris, historically tied to Algeria.

Because many Muslim public intellectuals compete for recognition by the state, they practice a form of self-censorship. Aiding them in this task is the intensity of the state's search for statements suggesting that a Muslim figure might be an Islamist, meaning someone vaguely associated with Islam-based political movements. Finding such statements can lead the government to exclude someone from French territory—as was the case for the noted intellectual Tariq Ramadan—or deny a resident's application for citizenship.

These constraints may explain a significant absence of writing of a certain kind by Francophone Muslims, an absence only noticed when we consider other possible ways of writing about Islamic law, such as those in Indonesia. The Indonesian argument for contextualizing Islamic law, so as to continue to adhere to it but also act in accord with basic values, is also a position enunciated for a French-speaking audience. But whereas Indonesian jurists, writing in a Muslim sociopolitical context, can assume that their readership shares their project of domesticating Islamic law, their Francophone Muslim counterparts must assume the opposite, that any mention of Islamic law will be met with suspicion.

It is because of this background of suspicion that writers such as Tariq Ramadan, a widely read proponent of creating a new European Islam, advocates a reinterpretation of *fiqh*, but refrains from suggesting how that reinterpretation might work. In close parallel to Indonesian proponents of “re-contextualizing Islam”, Ramadan (1998, 1999a, 1999b) underscores the flexibility of interpretation and, like them, mentions prominent examples of jurists and of the Caliph Umar, who placed the exigencies of time and place above the literal application of *shari'a*.

And yet, unlike his Indonesian counterparts, Ramadan refrains from taking the next step; he does not re-examine the texts of scripture with Europeans' values and norms in mind. For this reticence he has been criticized (Babès 2000) for allowing older notions, such as the rule that death is the penalty for apostasy, to go unchallenged.¹⁸

If the French context inhibits the out-and-out advocacy of *ijtihad*, or at least the specification of what that would mean, positions that one *may* hold include rejecting the *shari'a* in principle; or embracing it in principle but rejecting near-

18. This criticism is motivated by Ramadan's own ancestry. His grandfather was Hassan al-Banna, a founder of the Muslim Brotherhood, whose views are sometimes brought out to imply that, pluralistic though Ramadan might sound, he is really an “Islamist” at heart. See also Frégosi (1999).

ly all previous *fiqh* as peripheral to Islam. Among those taking the first position is Mohamed Charfi. Although Charfi works in university and government circles in Tunisia, he is widely read in Francophone Europe. Charfi's popularity is no doubt due to his rejection of Islamic law. He counterposes the Islamic faith, which he advocates, to "Islamic law", a concept into which he explicitly merges both *shari'a* and *fiqh* (1998, 57, 63–67, 154). While Islamic faith is compatible with modernity, he states, the system of "Islamic law" is not. One is faced with a choice between two alternatives, he argues: either consider it (meaning *shari'a* as well as *fiqh*) to be a human creation and thus subject to change in accord with the times, or consider it a divine creation and thus necessarily applicable in all its prescriptions, including, for example, the promotion of slavery. The choice, for him, is obvious: Islamic law must be rejected in its entirety.

Polygamy and divorce provide Charfi with prime examples of the incompatibility of Islamic law with modernity (68–69). He cites the right to have four wives and to repudiate them, and the difficulty experienced by women in divorcing, as *prima facie* evidence against Islamic law. Normativity in Islamic law is, for him, an attribute that comes from the text of the Qur'an. Attempts to interpret the Qur'an, to go beyond the text, lead to incoherencies because they produce any number of conflicting conclusions. For example (140 ff.), the Tunisians, using "patching", *talfiq*, came up with a courageous view of Islam, one that banned polygamy, but other interpreters were more timid and only limited polygamy.

Charfi's characteristic method is that of the *reductio ad absurdum*. He demonstrates that if one takes statements found in the Qur'an to be jural rules (the argument applies a *fortiori* to the *hadith*), one is often caught up in internal contradictions. For example, inheritance rules are so confusing that legislators were required to sort things out.¹⁹ One must then conclude that even Qur'anic rules are "facultative" and not obligatory, and thus it becomes incumbent on the legislator—the Tunisian example is always in his mind—to set out clear rules, ones that correspond to the condition of society.

The alternative publicly acceptable position in France is that *shari'a* is fine, but that hardly anything usually taken to be indicated by that term really is *shari'a*. Such is the argument advocated by Soheib Bencheikh, the son of the previous head of the Paris Mosque and the holder of a prestigious doctorate in France. Bencheikh had himself appointed mufti of Marseille by one of the Ministers of the Interior,

19. Charfi mentions (112–15) the fact that the fractions due to various categories of heirs exceed one, that there is no system of representation to deal with orphaned grandchildren, and that the Qur'an urges that bequests be made to heirs and yet a *hadith* states the opposite. All three examples are, indeed, well-known problems for Muslim jurists.

and was among the few Muslims received by President Chirac in January 2000 at a meeting held to compensate Muslims for having been left out of the traditional New Year's presidential reception of representatives of confessional communities. Bencheikh has little contact with Muslim groups in Marseille, and his legitimacy depends on his ability to represent himself as a representative of Islam to the state.

Bencheikh (1998) sets out to save the Qur'an as a source of specific juridical norms for Muslims. He does so by arguing that if the Qur'an does not prescribe a particular practice, then it is false to say that Islam prescribes it; rather, people have followed the norm as an ancestral custom rather than as part of Islam. In quick order, he dismisses excision, circumcision, and the famous headscarves as having nothing to do with Islam.

When he comes to the *talaq*, Bencheikh (1998, 134–38) makes an interesting move: he uses what he claims to be an analysis of Arabic to show the true character of the institution of divorce. Whereas in French there are two terms for divorce, *divorce* and *r pudiation*, in Arabic there is only one word, *al-talaq*, which means: “liberation” or “removing a lien”. If the husband decides to dissolve the marriage, he is called before a judge and asked to reconcile, says Bencheikh, and if this does not happen, to give his wife her due. A wife has the “absolute right” to demand a *talaq* from her husband. Thus, *talaq* is more like *divorce* than *r pudiation* (138). With respect to polygamy, Bencheikh (132–34) notes that polygamy is a right rather than an obligation, and therefore Muslims are not hampered in their religious practices by French laws prohibiting it.

Bencheikh thus adopts the complementary strategy to that pursued by Fadlallah in juristic commentary: to portray French and Islamic divorce norms as at base similar, or converging. Bencheikh does this by insisting that, whatever the cultural practices of Arabs, the Qur'an is relatively considerate of women; and Fadlallah by pointing to practices in North African courts that resemble those in France. Both assume that Islamic law must be justified in terms of the values and laws of the Republic, and not vice versa.

The debates in France index a deep conflict about the nature of French citizenship. France as a place chosen by its citizens, expressed in the voluntaristic motto of Renan, the *d sir d' tre ensemble*, consists of one *peuple* because everyone chooses the same République. France, in its history, is seen as a place of movement, of the war of the races between Franks and Gauls, of immigration, and of a continual opening up towards Europe, where “Europe” means recuperating French political values, especially human rights and the state of law.

By contrast, France as a cultural conception, as a “total social fact”, is constituted by the manners and language that are molded by schools, army service, the centralized academies, and so forth. The state, the vehicle for the general will,

allows individuals to realize their liberty. France has one *peuple*, but for a different reason, because this cultural-behavioral content (or *habitus*, the best native social theory for France) defines cultural citizenship and thus must be evenly spread over all regions and adopted by all immigrants.

CONCLUSIONS

Indonesian and French debates about Islam and social norms treat very similar issues: how to reconcile gender equality with divorce procedures, and how to reconcile normative diversity with political unity. However, the obligatory rhetorics of citizenship and culture are opposed. In Indonesia, although “unity in diversity” is the national motto, the state must represent unity as if it were a convergence of diversities. The state presents itself as merely facilitating a happy agreement among Islamic norms and the “living *adat*” of Indonesians. Positive law is treated as a positivization of Islam or *adat*, not as the imposition of higher-level laws in an effort to change local social norms. The debates index a high degree of anxiety about the nature of Indonesia itself, the respective roles of *adat*, Islam, and Indonesian-ness in defining the political community.

In France, the opposite is the case. The state presents itself as the source of equality and legitimacy for its citizens. New sets of social norms are legitimately French only if they can be shown to be equivalent to French norms. Diversity is then only apparent; cultural unity is the foundation for the Republic. Legally, this hierarchy of norms is represented in terms of public order; and politically, in terms of the requirements for safeguarding a political community.

Even as older legal and political frameworks tremble, challenges are framed in familiar terms. In Indonesia, feminist Muslim activists are calling for wholesale revisions of gender attitudes among judges and religious authorities, but their calls are in the terms of Islam; they are, in effect, calls for men and women to understand *shari'a* in a new way. Provinces are calling for autonomy, often in the name of *shari'a*, even when what that might mean is unclear to those doing the calling. In France, challenges to rules concerning school dress, acceptable forms of marriage, or the status of Islamic divorce are made in the name of universality. Calls for various forms of regional or religious self-determination are in the name of universal rights to practice a language or religion.²⁰

20. Future successful challenges to refusals to recognize polygamy are likely to appeal to the European norm that all children should receive equal treatment (Fadlallah, interview, Paris,

21 May 2001).

Comparisons, even of far-flung places, “most-different cases” in the language of political scientists, have the advantage of making evident things strange. In this case, they bring to the fore ways in which similar thrusts—toward gender-equal understandings of *shari‘a*—can be, perhaps must be, developed through quite different interpretive frameworks. The continuing challenge to social science and to normative political theory is to grasp the similarity of these thrusts across the dissimilarities of their languages.

REFERENCES

- Amselle, Jean-Loup. 1996. *Vers un multiculturalisme français: L'Empire de la coutume*. Paris: Aubier.
- Ancel, Bertrand, and Yves Lequette. 1998. *Grands arrêts de la jurisprudence française de droit international privé*. 3rd ed. Paris: Dalloz.
- Asad, Talal. 1986. *The Idea of an Anthropology of Islam*. Washington, D.C.: Center for Contemporary Arab Studies, Georgetown University, Occasional Papers Series.
- Babès, Leïla. 1997. *L'Islam positif: La Religion des jeunes musulmans de France*. Paris: Les Editions de l'Atelier.
- . 2000. "L'Identité islamique européenne d'après Tariq Ramadan." *Islam de France* 8:5–20.
- Bencheikh, Soheib. 1998. *Marianne et le Prophète: L'Islam dans la France laïque*. Paris: Bernard Grasset.
- Bowen, John R. 1998a. "Qur'an, Justice, Gender: Internal Debates in Indonesian Islamic Jurisprudence." *History of Religions* 38 (1): 52–78.
- . 1998b. "'You May Not Give It Away': How Social Norms Shape Islamic Law in Contemporary Indonesian Jurisprudence." *Islamic Law and Society* 5 (3): 1–27.
- . 1999. "Legal Reasoning and Public Discourse in Indonesian Islam." In *New Media in the Muslim World: The Emerging Public Sphere*, ed. Dale F. Eickelman and Jon W. Anderson, 80–105. Bloomington: Indiana University Press.
- . 2000a. "Consensus and Suspicion: Judicial Reasoning and Social Change in an Indonesian Society, 1960–1990." *Law and Society Review* 34 (1).
- . 2000b. "The Search for New Sources of Legitimacy in Indonesia after Suharto." Paper presented at L'Institut International de Sociologie Juridique (Euskadi), 3–4 April 2000.
- Brubaker, Rogers. 1992. *Citizenship and Nationhood in France and Germany*. Cambridge, Mass.: Harvard University Press.
- Cammack, Mark. 1997. "Indonesia's 1989 Religious Judicature Act: Islamization of Indonesia or Indonesianization of Islam?" *Indonesia* 63:143–68.
- Charfi, Mohamed. 1998. *Islam et liberté: Le Malentendu historique*. Paris: Albin Michel.
- Charnay, Jean-Paul. 1998. "Que devient une religion réduite à l'observance rituelle?" *Islam de France* 1:31–42.
- Déprez, J. 1996. "Statut personnel et pratiques familiales des étrangers musulmans en France: Aspects de droit international privé." In *Familles–islam–Europe: Le Droit confronté au changement*, ed. Marie-Claire Foblets, 57–124. Paris: L'Harmattan.
- Durkheim, Emile. [1906] 1978. "Divorce by Mutual Consent." In *Emile Durkheim on Institutional Analysis*, trans. Mark Traugott, 240–52. Chicago: University of Chicago Press.

- Esposito, John L. 1982. *Women in Muslim Family Law*. Syracuse: Syracuse University Press.
- Frégosi, Franck. 1999. "Tariq Ramadan ou les habits neufs d'une vieille rhétorique!" *Chemins de dialogue* (November): 125–151.
- Grillo, R. D. 1998. *Pluralism and the Politics of Difference*. Oxford: Clarendon Press.
- Hanagan, Michael, and Charles Tilly, eds. 1999. *Extending Citizenship, Reconfiguring States*. Lanham, Md.: Rowman & Littlefield.
- Kokkini-Iatridou, D. 1994. "Les Clauses d'exception en matière de conflits de lois et de conflits de juridictions." In *Les Clauses d'exception en matière de conflits de lois et de conflits de juridictions—ou le principe de proximité*, 3–43. The Hague: Martinus Nijhoff.
- Kymlicka, Will. 1995. *Multicultural Citizenship*. Oxford: Oxford University Press.
- Légier, Gérard. 1999. "Les Rapports familiaux et l'ordre public au sens du droit international privé." *Revue de la recherche juridique, droit prospectif* 78:293–311.
- Lev, Daniel S. 1973. "Judicial Unification in Post-Colonial Indonesia." *Indonesia* 16:1–37.
- . 1985. "Colonial Law and the Genesis of the Indonesian State." *Indonesia* 40:57–74.
- Lorcerie, Françoise. 1994. "Les Sciences sociales au service de l'identité nationale." In *Cartes d'identité*, ed. Denis-Constant Martin. Paris: Presses de la Fondation Nationale des Sciences Politiques.
- Modood, Tariq, and Pnina Werbner, eds. 1997. *The Politics of Multiculturalism in the New Europe*. London: Zed Books.
- Monéger, Françoise. 1992. "Aspects théoriques et pratiques du mariage polygamique en France." In *Islam et/en la cité*, 54–108. Perpignan: Presses Universitaires de Perpignan.
- Noiriel, Gerard. 1996. *The French Melting Pot*. Trans. Geoffroy de Laforcade. Minneapolis: University of Minnesota Press.
- Pearl, David and Werner Menski. 1998. *Muslim Family Law*. 3rd ed. London: Sweet & Maxwell.
- Poulter, Sebastian. 1995. "Multiculturalism and Human Rights for Muslim Families in English Law." In *God's Law versus State Law: The Construction of an Islamic Identity in Western Europe*, ed. Michael King, 81–87. London: Grey Seal.
- . 1998. *Ethnicity, Law and Human Rights*. Oxford: Clarendon Press.
- Ramadan, Tariq. 1998. *Les Musulmans dans la cité : Responsabilités et droits des musulmans dans les sociétés occidentales*. 2nd ed. Lyon: Tawhid.
- . 1999a. *To Be a European Muslim*. Leicester: The Islamic Foundation.
- . 1999b. *Muslim in France: The Way towards Coexistence*. Leicester: The Islamic Foundation.
- Rath, Jan, Rinus Penninx, Kees Groenendijk, and Astrid Meyer. 1999. "The Politics of Recognizing Religious Diversity in Europe: Social Reactions to the Institutionalization of Islam in the Netherlands, Belgium and Great Britain." *Netherlands Journal of Social Sciences* 35 (1): 53–68.

- Rawls, John. 1996. *Political Liberalism*. 2nd ed. New York: Columbia University Press.
- Rouland, Norbert, J. Poumarède, and S. Pierré-Caps. 1996. *Droit des minorités et des peuples autochtones*. Paris: PUF.
- Soysal, Yasemin Nuhoglu. 1994. *Limits of Citizenship: Migrants and Postnational Membership in Europe*. Chicago: University of Chicago Press.
- Zein, Dr H. Satria Effendi M. 1996. “Analisis yurisprudensi tentang warisan: analisis fiqh” (Case analysis concerning inheritance: analysis of fiqh). *Mimbar Hukum* 24:106–13.

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